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## **A Psycho-Legal Perspective on Sexual Offending in Individuals with Autism Spectrum Disorder**

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## **Abstract**

It is important to consider whether there are innate vulnerabilities that increase the risk of an individual with an autistic spectrum disorder (ASD), predominantly those defendants with a diagnosis of Asperger's Syndrome, being charged and convicted of a sexual offence. The significance of such can be readily seen in recent English case law, with judgments on appeal finding convictions unsafe where there have been a number of failings in the Judge's summing up. In this article, we will consider the gravity of Judges omitting to highlight a defendant's diagnosis of autism spectrum disorder and the necessity of detailed explanations to jury members regarding the condition and its effect upon thoughts and behaviour. Consideration will be specifically given to the necessity to prove sexual motivation in such offences and the judicial direction required in relation to whether the appellant's actions had been sexually motivated. Recognition of the social impairments inherent in ASDs are vital to this work and we shall consider whether the difficulty with the capacity to develop appropriate, consenting sexual relationships as a result of impaired social cognition may be one of the factors which increases the risk of sexual offending in individuals with ASD (Higgs & Carter, 2015).

**Key words:** Asperger's Syndrome; autism spectrum disorder; ASD; AS; sexual offending; sexual offences.

## Introduction

Autism Spectrum Disorders (ASDs) have been defined as “a group of disorders characterised by qualitative abnormalities in reciprocal social interactions and in patterns of communication, typically characterised by impairments in social reciprocal interactions and communication, (with) restricted, repetitive pattern of interests and behaviour” (American Psychiatric Association (APA), 2000, 2013). The Diagnostic Statistical Manual fifth edition’s (DSM-V, American Psychiatric Association, 2013) has resulted in significant criticisms as a result of the new criteria for ASD (i.e., Waterhouse, 2013; Wing, Gould, & Gillberg, 2011; McPartland, Reichow, & Volkmar, 2012; Ritvo, 2012). One of the main criticisms of the DSM-V was the new name of ASD used to encompass what used to be four separate disorders, namely, autistic disorder (autism), Asperger’s disorder, childhood disintegrative disorder, and pervasive developmental disorder not otherwise specified (e.g., Fernell et al., 2012). These four separate disorders (previously considered to be separate in the previous edition of the DSM) are now considered to be a single condition with different levels of symptom severity in two core domains. ASD is characterised by: 1) deficits in social communication and interaction, and 2) restricted repetitive behaviours, interests, and activities (RRBs) (APA, 2013). Elsabbagh and colleagues (2012) conducted a systematic review of epidemiological surveys of autistic disorder and pervasive developmental disorders (PDDs) worldwide. Based on the evidence reviewed, Elsabbagh and colleagues (2012) found that the median of prevalence estimates of ASDs was 62/10000.

It is important to highlight here, that this article is to focus solely upon those with an ASD accused of offences of a sexual nature. Violence, with no sexual component, is not the focus of this paper. We will consider the importance of the preconception of behaviour by juries and Judges and the negative impact this has had upon defendants with an ASD, who because of the very nature of the condition, may present in a way often detrimental to the outcome of their case. This will be achieved with specific reference to current clinical research, and omissions within English case law.

### *Autism Spectrum Disorder and Inappropriate Sexual Behaviour or Sexual Offending*

There have been a number of papers which have investigated cases where an individual with ASD have engaged in a sexual offence or inappropriate sexual behaviour. Inappropriate behaviours have included such actions as giving a stranger a kiss (Clements & Zarowska, 2000), intruding on the personal space of an individual that they are infatuated with (Green, Gilchrist, Burton, & Cox, 2000; Howlin, 1997; Katz & Zemishlany, 2006), to inappropriate acts of masturbating (e.g., masturbating in a public place) (Haracopos & Pendersen, 1992; Ray, Marks, & Bray-Garretson, 2004). Some studies have also reported cases of individuals with ASD who have become sexually violent (Fujikawa, Umeshita, & Mutura, 2002; Kohn, Fahum, Ratzoni, & Apter, 1998; Murrie, Warren, Kristiansson, & Dietz, 2002). Another study carried out a survey of 100 caregivers (i.e., parents or guardians) regarding the sexual knowledge and behaviours of children, adolescents, and adults with ASD (Ruble & Dalrymple, 1993). Findings revealed that respondents described those in their care as engaging in a number of sexual behaviours which are considered to be inappropriate. Some of these inappropriate sexual behaviours identified included: masturbating in public (23%), inappropriate touching of the opposite sex (18%) and the use of unusual objects for masturbation (14%). However, the most frequent concern that the caregivers had was their child inappropriately touching their genitalia in public (65%) (Ruble & Dalrymple, 1993).

### *Risk Factors for Inappropriate Sexual Behaviour or Sexual Offending*

There have been a number of other studies which have found that individuals with ASD are not at increased risk of offending generally (e.g., Woodbury-Smith, Clare, Holland, and Kearns, 2006; Mouridsen, 2012). However, research does seem to indicate that specific key ASD features are frequently found in individuals with ASD who commit crime (Attwood, 2007; Barry-Walsh & Mullen, 2004; Haskins & Silva, 2006; Howlin, 2004; Murrie et al., 2002). In their recently published review, Mogavero and Mogavero (2016) found a number of studies which indicated that a large proportion of the deviant or sexual offending behaviour committed by individuals with ASD is frequently due to their ASD symptoms as opposed to malice. For instance, an impaired 'Theory of Mind' (ToM) or an intense preoccupation with a narrow interest is often associated with engagement in criminal behavior in individuals with ASDs (Haskins & Silva, 2006) such as that demonstrated in the case of Gary McKinnon (The Daily Telegraph, 2009). Mr McKinnon hacked into the Pentagon computer because he was preoccupied with the search for signs of extra-terrestrial life. ToM refers to a person's ability to attribute mental states (e.g., beliefs, intents, desires, pretending, knowledge) to oneself and others and also the ability to understand that others have beliefs, desires, intentions, and perspectives that are different to their own (Frith & Happe, 1994).

Some researchers have hypothesised ToM deficits as one contributory factor in acts of violent crime in individuals with high-functioning ASD (hfASD) (Baron-Cohen, 1988; Kohn et al., 1998). ToM has been found to be impaired in individuals with ASDs. However, research indicates that the pattern of deficit may be unique in individuals with hfASDs. The majority of individuals with hfASD are unimpaired on basic first-order ToM tasks (e.g., understanding that another individual can have a false belief about the location of an object) and second-order ToM tasks (e.g., understanding what one individual might think about another). This supports the theory that there may only be a developmental delay in the onset of these ToM abilities in some individuals with ASD (Kaland et al., 2008). Other studies have also suggested that individuals with ASD can engage ToM but that it may not take place spontaneously unless it is explicitly prompted (e.g., Senju et al., 2009). An individual with ASD may become confused or overwhelmed by a barrage of social information when they are required to respond to a social situation spontaneously, under duress (Stein, Klin, & Miller, 2004). It is important to note here that in the vast majority of individuals with hfASD such confusion does not always result in violence or offending behaviour (Goldberg et al., 2007).

An impaired ToM can be detrimental to the individual's ability to understand social cues and can also impact negatively on impulse control and ability to empathise. Such individuals appear to be "genuinely unaware of the harm they caused their victims" (Murrie et al., 2002: 66). Another factor which has been posited to contribute to sexual offending behaviour in individuals with ASD is the 'impaired ability to appropriately interpret their victim's negative reactions' to their sexual advances in some individuals with ASD (Freckelton & List, 2009). This notion of deficient empathy, a common explanation in such individuals, is a view supported by others (i.e., Wing, 1981; Attwood, 2007).

Difficulties with developing appropriate, consenting adult sexual relationships due to impaired social cognition may be one of the factors which contributes to the increased risk of sexual offending in individuals with ASD (Higgs & Carter, 2015; Allely & Creaby-Attwood, 2016). Feelings of victimisation or having a grudge and desire to seek revenge may be the precursors to engagement in criminal behaviours in other individuals with ASDs (Allen et al., 2008; Attwood, 2007).

It has also been suggested that, due to the little or no experience of being in an intimate relationship, some individuals with ASD may find it difficult to express their sexuality within the 'context of an appropriate relationship'. This may result in offending behaviour as a result of the individual's sexual frustration (Murrie et al., 2002). Another factor which may contribute to sexual offending behaviour in individuals with ASD are impaired impulse control and empathy which can impair the individual's ability to understand the consequences of their action and cause them to act "without thinking" (Haskins & Silva, 2006; Ray & Marks, 2004).

The "obsessional" interest which is frequently exhibited in individuals with ASD has also been posited as one of the factors which may contribute to sexual offending behaviour if the obsessional interest has a sexual component or is perceived by the individual with ASD as being sexually related (Murrie et al., 2002; Haskins & Silva, 2006). Chesterman and Rutter (1993) outlined the case of a 22-

year-old male with an ASD who had a history of stealing cotton lingerie and masturbating while holding women's nightdresses. This case was consistent with the theory that there are some instances where individuals with ASD might indulge in such criminal behaviour as a result of their sexual preoccupations. Sutton and Choutka (2007) highlighted the issue of social misperception in the case of a boy of 12 years of age, diagnosed with autism who committed a sexual offence. A small group of similar-aged peers who were around the same age of the boy befriending him which he reports was the first time he had ever had friends who were age appropriate. It was reported that the group convinced their new "friend" to join them in sexually assaulting another peer. The boy in this case example failed to appreciate the harm that his actions had on his victim until after he was arrested (Sutton & Choutka, 2007).

Lastly, a recent systematic review investigated the literature which explored sexual offending in individuals with ASD (Allely & Creaby-Attwood, 2016). The review highlighted that there were only a few case reports (N = 7) on sexual offending in individuals with ASD ((Brendel, Bodkin, Hauptman, & Ornstein, 2002; Milton, Duggan, Latham, & Tantam, 2002; Murrie, Warren, Kistiansson, & Dietz, 2002; Ray, Marks, & Bray-Garretson, 2004; Haskins & Silva, 2006; Griffin-Shelley, 2010; Chan & Saluja, 2011) and only a small number of prevalence studies (N = 7) were identified (Mouridsen, Rich, Isager, & Nedergaard, 2008; Långström, Grann, Ruchkin, Sjöstedt, & Fazel, 2008; 't Hart-Kerkhoffs, Jansen, Doreleijers, Vermeiren, Minderaa, & Hartman, 2009; Kumagami & Matsuura, 2009; Bleil Walters et al., 2013; Søndena, Helverschou, Steindal, Rasmussen, Nilson, & Nøttestad, 2014). Some of the case studies identified in the review by Allely and Creaby-Attwood (2016) clearly highlight the need to consider these innate vulnerabilities which may increase the risk of an individual with ASD being charged with a sexual offence.

This paper will consider what happens when these behaviours infringe upon definitions and determinations within criminal legislation in England and Wales.

## **Sexual Offending, Sexualised Behaviour and the Defendant with an ASD**

### *Autism Spectrum Disorder, Inappropriate Sexual behaviour, and/or Sexual Offending*

Considering the 2013 case of R v GW (2013); here it was alleged that the appellant had displayed deviant sexual behaviour and was consequently liable for conviction. GW was convicted in 2009 in the Crown Court at York of sexual assault of a child under the age of 13, and engaging in sexual activity in the presence of a child under the age of 13. He was sentenced to 12 months' imprisonment respectively, running concurrently. His behaviour was said to include picking up a child; his daughter, with his hand going in and out of his pocket many times. He was described by an on-looker as restless, breathing heavily and rocking backwards and forwards. He was said to also have an erection at this time. The defendant denied that most of the alleged actions had occurred at all. However, the jury convicted unanimously.

On appeal in 2013 Professor Digby Tanby provided expert evidence stating that GW “met the accepted criteria for autism”. He advised the Court that “the appellant’s ability to explain or justify his situation would be reduced in comparison to a person of similar intelligence who does not have ASD. He further indicated that rocking or rhythmic stimulation by people with an autistic spectrum disorder was a form of tension relief and not a reliable indicator of sexual arousal.” Consequently, in this case it was submitted by the defence that this information would have been of some significance to the final outcome, stating it would have “changed the jury’s perception of the appellant...”. The Crown arguing to the contrary accepted that the appellant may have had difficulty explaining himself, and possibly even the lack of concern for his behaviour (could be attributed to the condition), however the Crown contended that the appellant was witnessed as having an erect penis and there was the inference of masturbation, and this issue of fact was the primary consideration in this case. As such the medical evidence was considered by the Court of Appeal as “very relevant to any future considerations of the appellant and his position but it was held it did little to answer the factual question of whether the specific acts occurred at all.” It was the outcome therefore in this case that the diagnosis did not affect verdict and the appeal was dismissed.

Alternatively, to consider a later case of *R v Stewart* (2015); here the defendant was accused of exposing his penis to a three-year-old boy and inviting him to touch it. It was said by the Prosecution that the actions were with sexual motivation. Stewart argued that he had behaved in this way to teach the boy regarding appropriate and inappropriate touching. He stated in evidence that the child had been watching a video and he was concerned about the content. He went on to claim that he and his brother had been sexually abused and he wanted to educate the child. Following his conviction Stewart appealed. It was held (along with other reasons which were vital to the result on appeal though not relevant to the argument in this paper) that “nowhere in the summing up had the judge dealt with the defendant’s autistic spectrum disorder nor addressed the jury on the crucial issue of whether his actions on the day in question had been sexually motivated, rather than for the educational purposes that Stewart had indicated.” It was because of this, that the cumulative effect of all of the deficiencies in the summing up rendered the conviction for causing or inciting a child under 13 to engage in sexual activity to be unsafe.

The crucial issues for the purposes of this analysis regarding this case are as follow: that the jury were expected to turn their minds to whether there was sexual motivation, whether this would have been an easier task had they been furnished with evidence regarding the defendant’s ASD and the fact that this should all have been included in the Judge’s summing up. In consequence on successful appeal the summing up was described as inadequate.

### *Legal Implications of a Diagnosis of ASD in a Defendant*



To consider this further and to look at the potential explanations behind different decisions on appeal with what on the surface appeared to be similar circumstances, we will reflect upon the legal implications for sexual offence convictions and the effect upon the defendant with an ASD.

To be criminally liable for any offence in England and Wales, generally two elements of the offence need to be satisfied for the offence to be made out; that is the *actus reus* and the *mens rea*.

The *actus reus*, relates to the act itself within the offence, or in certain offences the omission to act.

Generally, the question raised would be did the person do the act? For example, and here broadly speaking, in an offence of common assault (battery), we would consider whether the accused touched the alleged victim; the *touching* would be the act, the *actus reus*. An omission *actus reus* for example would be failing to stop after a road accident, the *omission* to stop.

The *mens rea*, is often described as the mental element of the offence. To take the earlier example of battery, the *mens rea* would be whether the accused *intended* the touching, or was *reckless* that the touching occurred. Intention, recklessness and sometimes negligence are confined within the *mens rea* of the offence.

Unless both elements of the offence are proved, the accused cannot be convicted. Should the *actus reus* and *mens rea* be proved then the Court would consider any defences put forward as to why the behaviour occurred.

To continue with the example of the offence of battery, consider that the accused admits he struck someone (the touching occurred and therefore the *actus reus* is proved); he states that he meant to strike them (the *mens rea* is proved in that he intentionally struck them) however he states that he only did this to protect himself, he may have a defence of self-defence. Should this be accepted the defendant cannot be convicted.

The legislative framework regarding sexual offending in England and Wales is governed by the Sexual Offences Act 2003. Alongside the above, that is, the *actus reus*, *mens rea* and defences to be considered, many sexual offences are constructed with additional caveats. Simply put, for the offence to succeed, the act must be sexual, and (for some sexual offences) the defendant must not have reasonable belief that the alleged injured party has consented to the act. With the assistance of recent case law, we will consider these two extra elements, the issue of belief of consent and what is understood as sexual. We will consider this with specific reference to the accused defendant who has been diagnosed with an ASD

With these two caveats in mind, criminal cases of a sexual nature result in jury members deciding whether the act was sexual. Initially, on first glance, this may appear an easy task.

However, we will go on to discover that it actually places jury members in an unenviable position when making such a determination as to whether an act is indeed sexual.

To refer to the statutory terminology in section 2 of the Sexual Offences Act 2003 specific consideration is given to section 2(1)(b), that is assault by penetration, which refers to *penetration* which is sexual,

and section 3(1)(b); sexual assault (including that of a person under 13, found at section 7 of the Act) which refers to *touching* which is sexual (author's emphasis).

At this point the jury has to begin the task of considering what is meant by sexual.

Other than in relation to section 71, (sexual activity in a public lavatory), section 78 of the Sexual Offences Act 2003 provides as follows;

“penetration, touching or any other activity” is sexual if:

“a reasonable person would consider that—

(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or

(b) because of its nature it may be sexual, and because of its circumstances or the purpose of any person in relation to it (or both), it is sexual”

To consider this further, we must explore specifically what is an ‘activity that the reasonable person would always consider to be sexual because of its nature’. Or put another way, what nature of an activity may be necessary to always be considered sexual?

Whether touching is “sexual” is a matter for the jury following direction from the judge in line with the statutory provision as above. According to *R v H* (2005) where the issue is whether something is sexual under s.78(b) that is, not inherently sexual but, because of its nature may be sexual and becomes sexual because of its circumstances or the purpose of a person in relation to it, then the correct approach is to apply s.78(b) as a two-stage test. This would involve the judge directing the jury that the “touching” must be, by its nature capable of being sexual and then to direct the jury that they must decide whether as a matter of fact it was sexual by reference to the circumstances and or the purpose of any person in relation to it.

In *R v H* (2005) the Court of Appeal succinctly considers the determination of the term sexual with specific reference to section 78 of the Sexual Offences act 2003. Reference is also made to the cases of *R v Court* (1989) and the 1956 case of *R v George*, a case involving the sexual nature of shoe fetishes.

*R v H* began in 2004 in the Crown Court at Teesside before the Recorder of Middlesbrough. H, the defendant was convicted of sexual assault contrary to section 3 of the Sexual Offences Act 2003. The Court of Appeal in *R v H* heard that on 1<sup>st</sup> July 2004 the complainant encountered H who was alleged to have grabbed her by her clothing and attempted to place his hand over her mouth. Prior to this act the Prosecution state he said “do you fancy a shag” and “are you shy”. A submission was made by the defence for the case to be withdrawn from the jury “as to whether anything occurred which a reasonable person could regard as sexual within the meaning of the Act” (at para 27). The judges view was that the alleged words said were sufficient to satisfy this test. On appeal, it was raised that the sentencing judge in his approach at the time and in summing up “did not take the two-stage approach to section 78 (b)” as described above.

The Court of Appeal held that there was failure in this case in the judge's summing up as to the

terminology of “touching” and ‘sexual’. However, it was found that this had no adverse effect upon the safety of the conviction and the appeal was lost. What is important from this case as to this discussion is the neat definition of the two-stage test laid out within the Appeal decision:

“(would the jury) consider that because of its nature the touching that took place in the particular case before them could be sexual? If the answer to that question was “No”, then the jury would find the defendant not guilty. If yes, they would have to go on to ask themselves (again as twelve reasonable people) whether in view of the circumstances and/or the purpose of any person in relation to the touching or both, the touching was in fact sexual. If they were satisfied that it was, then they would find the defendant guilty. If they were not satisfied, they would find the defendant not guilty.”

The Sexual Offences Act 2003 Explanatory Notes at section 146 consider this in light of ambiguous and non-ambiguous actions, and it is most notable that this again is considered through the eyes of the ‘reasonable person’. It describes acts that are considered obviously sexual: “(those) the reasonable person would always consider to be sexual, such as sexual intercourse”, and the ambiguous acts; those “that the reasonable person would consider, because of its nature, may or may not be sexual depending on the circumstances or the intentions of the person carrying it out, or both: for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason.” So, with recognition of the restrictions afforded to the Explanatory Notes it appears from this guidance that to the reasonable person, intercourse, masturbation, cunnilingus and fellatio are perhaps unlikely to be considered as anything other than sexual.

These cases show the need for consideration for a libidinous pre-requisite to the *actus reus*.

### *Cases of Autism Spectrum Disorder and Sexual Offending in the Criminal Justice System*

To consider the specific issue of sexual intent and the effect upon the decision-making process of the jury member in sexual offence cases, from the above, it must be recognised that they will therefore have in the forefront of their mind whether the *reasonable person* would consider the action within the offence to be sexual. That is, it is likely they will consider this fictional “reasonable person” to be much like themselves or their eleven fellow jury members. It is therefore relevant to consider that judgments will likely be made with reference, whether implicitly or explicitly, to the behaviour of the defendant giving evidence and whether the explanation of the behaviour sounds believable to them. With reference to the issue of sexual offending and whether the accused person with an ASD has, because of the very nature of the disorder, been disadvantaged with the additional burden of overcoming unusual presentation both in court and at the time of the offence, (that is, the burden of impaired impulse control and empathy as per Haskins and Silva (2006) and also Ray and Marks (2004)), we will consider three cases particularly pertinent to this debate. These cases are particularly relevant as they consider how statute overlaps, but is not synonymous with the clinical constraints of paraphilia, and as such perhaps suggests a dichotomy between the clinical and legal definitions regularly employed in court. They are

a small example to highlight the complex issues in this area, and the difficult processes for jury members, medical experts, judiciary, advocates and perhaps most importantly a defendant with an ASD.

#### R v TS (2008)

The basic facts of the case are such that on Christmas Eve of 2003 T engaged in sexual conduct with his estranged wife. This occurred in her home where she lived with their three children. It was alleged that the conduct involved intentional touching of the vagina and penetration of the vagina with his penis. He was charged and later convicted of rape and indecent assault. Throughout trial T never disputed the *actus reus*, that is he concurred to sexual touching and sexual intercourse. However, he maintained that the sexual behaviour was consensual. Following conviction T proceeded to apply for leave to appeal, despite advice from his (then) counsel that there were no grounds. A number of grounds all of his own composition were rejected initially by single judge. Following a transfer from prison to a psychiatric hospital under section 47/49 Mental Health Act 1983 in late September 2006, a diagnosis of Asperger's Syndrome was made whilst T was benefitting from a period of inpatient assessment. The criminal matter was then returned as an adjourned, renewed application for leave to appeal with an application to admit new evidence. T appealed both the conviction and the sentence of four years' imprisonment raising the issue of the safety of the conviction. His argument was such that he put forward, in light of fresh evidence from consultant forensic psychiatrists; one acting for the Crown, the other his treating physician the sentencing outcome would have been different had the Court been aware of his ASD.

The Court heard evidence that T had received psychiatric treatment since 1999, and was initially diagnosed with delusional jealousy with the focus of his attention being upon his ex-wife. As regards the latter diagnosis of ASD, the medical evidence was such that T's disorder rendered him, at the time of the offence, unable to "understand in real time, the signs and even straightforward indications with those he comes into contact with" and that "although he would have been aware that consent was required for sexual contact, his disorder impacted on his ability to adequately determine another person's beliefs or desires in ambiguous situations." Whilst this evidence was not corroborated by the medical expert for the Crown, it was recognised that this expert lacked experience in the diagnosis of ASD.

What is most interesting and vitally relevant to our analysis here is that at his initial trial he was described as displaying odd behaviour such as reading a book whilst the prosecution witness gave evidence. Therefore, his diagnosis of ASD may not only afford a defence as to lack of *mens rea*, it could also significantly affect any decision made by the jury members regarding his credibility as a witness. Remembering that consideration would be given as to his behaviour regarding whether he was "honest about what he believed to have been the situation, even if the facts were otherwise as the complainant said them to be." (Rix LJ) then the ASD would have been an important factor in this decision. A retrial was ordered on the grounds that the convictions were unsafe. It was held that the appeal was allowed and the convictions were quashed.

The case of TS clearly indicates the consequences should juries be unaware of the effect of ASD upon the ability of an accused to understand the consequences of their actions and the potential this has to cause them to act “without thinking” (Haskins & Silva, 2006; Ray & Marks, 2004). To take this further in the case of R v MB, we shall look at the necessity for sexual gratification to be established prior to conviction.

#### R v MB (2012)

Here, another case taken to the Court of Appeal following the conviction of a young man with an ASD for charges of voyeurism. B was charged under section 67 of the Sexual Offences Act 2003. To outline the facts of the case briefly, this young man was accused of lying on the floor of a sports centre changing room watching six-year-old boys getting undressed. Again, it was the evidence of two medical experts that this man had an ASD alongside a specific learning disability. This case differs in that the evidence was available at the first trial. However the defendant was considered unfit to plead, and as such under s4A(2) of the Criminal Procedure (Insanity) Act 1964 (as amended), all that needed to be proved was whether B was guilty of the actus reus. In effect, had he done the act? He fully admitted lying on his back to look at the young naked boys and so it seemed there was little to question. However, on appeal counsel for the defence submitted that there was no sexual gratification associated with his behaviour, indeed the defendant suggested throughout trial that he was laying on his back because he had backache. Without fully detailing the complex legal arguments that were raised on appeal, it can be noted that it was found that the “link between deliberate observation and the purpose of sexual gratification of the observer was central to the statutory offence” (Aitkens LJ) and that the jury therefore should have considered whether the act occurred for the purposes of sexual gratification. B had an ASD diagnosis and it was suggested on appeal that the expert evidence would have been *useful* to a jury to consider “whether or not the appellant’s state of mind was such that he was *deliberately* observing for his own sexual gratification” (authors’ emphasis). The appeal was allowed, and the defendant was acquitted. This case makes clear the requirement of the purpose of sexual gratification. Here, voyeurism is not only the observation of another person doing the private act, the purpose of the observation must be for sexual gratification.

#### R v Thompson (2012)

To take further the exploration of non-sexual explanations for what would reasonably be considered sexual behaviour, we review the case of R v Thompson (2014). A suggestion has been made by those such as Ruble and colleagues (1993) and later Kalyva (2010) that a contributory factor to sexual behaviour and subsequent sexual offending is the increased tendency for those with an ASD to engage in sexual behaviour in public places. Masturbation in a public place being a clear example of this. For instance, in the case of R v Thompson (2014) there was a long history of sexual behaviour many of

which resulted in convictions. The chronology of his criminal behaviour is as follows: At eighteen years old he was accused of encouraging a six-year-old boy to masturbate him in a graveyard. At twenty-one, he was again brought before the court accused of rubbing a child's genitals outside of his clothing. Periods of imprisonment were imposed and immediately on release fresh complaints of sexual offences were again raised. This time young boys described mutual masturbation and they detailed Thompson bathing with them, describing him roughly towelling dry thirteen year olds. Other behaviour resulting in criminal convictions involved smacking young boys, and holding their penis whilst drying them. Additionally, the Court heard evidence of computer searches of 'under age rent boys in Sri Lanka.'

Thompson pleaded guilty and generally admitted the behaviour. However, again the point of interest here is that he, like the others, had a non-sexual explanation for his behaviour. Once again as in the case above, he described the masturbation as educational, stating in evidence "it wasn't the way my cousin showed me how to do it". He explained drying the boys as only to speed up the process. He stated he was looking up 'rent boys in Sri Lanka' as a computer search, telling that he was going on holiday in the area. He explained that in light of TV coverage of famous pop stars being arrested for such behaviour, his actions were only to find out how to avoid getting in to trouble. Each time he had a reason for his sexual behaviour. Whether this seems like an excuse, albeit a fantastical excuse, what is important is that a clinical psychologist and later a consultant forensic psychiatrist diagnosed an ASD and described his behaviour as "rigid, very ordered and mechanical in social relationships." They also stated in reports that Thompson was anxious to maintain the order he had imposed upon his life." He was described by the experts as showing "lack of emotional understanding which would make him seem at times, callous, and selfish because he would be unaware of the impact of his behaviour on others."

Having been provided with this diagnosis and clinical information, in 2012, almost thirty years following his first court appearance for sexualised offending behaviour Thompson was once again before the court charged with historical sexual offences primarily against young boys. The jury returned verdicts of not guilty on all counts. In light of this, a subsequent appeal hearing took place before Pitchford LJ and Sweeney LJ relating to the earlier convictions. The appeal was successful and it was held that;

"...the expert evidence upon which the appellant relied in 2012 was both relevant and of some probative importance...The jury in the 2007 trial was very much concerned with the interpretation of the appellant's alleged conduct, partly admitted and partly denied. We cannot conclude the decisions made by the jury in 2007 would undoubtedly have survived their consideration of the new evidence admitted in the appeal. For this reason, we take the view that the verdicts were unsafe and must be quashed" (Pitchford LJ, R v Thompson, 2014)

## **Clinical Implications**

Relatively little is understood about sexual offending in individuals with ASD and therefore, there is little with which to inform the design of appropriate treatment for this group. A few studies have highlighted the importance of sexuality education as part of the treatment strategy for individuals with ASD in order to successfully develop a fulfilling sexual relationship (e.g., He'nault, 2006). Such sexuality education programmes targeted for individuals with ASD may include training relating to interpersonal skills, gender and sexual identity, masturbation, and contraceptives. Unfortunately, although there have been numerous calls highlighting the need for sex education programmes which are specific to individuals with ASD, there has been relatively few investigations of sexuality education in this population (Sevlever et al., 2013). In the case outlined in the paper by Griffin-Shelley (2010), the authors suggest that treatment for an individual with an ASD who is sexually compulsive would be more effectively treated based on an addiction recovery as opposed to an offender model. The addiction recovery model would be more effective with individuals with ASD as it focuses on behaviour change, identifying the triggers which lead to the offending behaviour (frequently emotional difficulties), learning to request and use support when needed, and the importance of honesty (Griffin-Shelley, 2010). Moreover, Pritchard, Graham, Penney, Owen, Peters and Mace (2016) recently reported the case of the effective use of multi-component behavioural intervention to reduce harmful sexual behaviour in a 17-year-old male with ASD.

In a recent study, Baarsma and colleagues (2016) investigated sexual development and behaviour as well as stability of ASD-like symptoms in a sample of 44 male juveniles who had committed a sexual offense (JSOs) (mean age  $24.7 \pm 1.5$  years) 8 years after their sexual offence. Findings revealed that, compared to a matched normal population sample, JSOs exhibited less knowledge of sexuality, less positive attitudes towards pornography and more frequently reported having been a victim of verbal sexual intimidation. Over the eight years' follow-up, ASD symptoms were found to be relatively stable. Thus, social difficulties in JSOs may be part of 'life-long autistic-like traits'. ASD symptoms were not found to be associated with alterations in sexual development or behaviour. Moreover, ASD symptoms in JSOs were found to persist over time. Lastly, in terms of sexual victimisation, the study highlighted that JSOs, particularly JSOs with more marked symptoms of ASD, are frequently the victims of sexual offenses. In sum, Baarsma and colleagues (2016) argue that their findings support the need for more research in order to further investigate ASD-specific sexual problems, or subtle psychosexual disturbances in JSOs. There also needs to be more research investigating the prevalence of ASDs in JSOs (Baarsma, Boonmann, Lisette, de Graaf, Doreleijers, Vermeiren, & Jansen, 2016).

In an earlier study, Sutton and colleagues (2013) investigated 37 male adolescents adjudicated delinquent for sexual offenses who were sentenced to treatment. They found that 22 (60%) fulfilled the diagnostic criteria for an ASD. All 22 adolescents were in the average range in terms of intelligence. Sutton and colleagues recommend that there is a need to modify traditional treatment protocols. For instance, there is a need to modify the type of interventions and the method(s) of delivery in order to

accommodate the unique needs of individuals with ASD. More appropriate intervention may produce more positive therapeutic outcomes (e.g., O'Callaghan, 2006). For example, it is well-established that individuals with ASD are frequently visual learners. Therefore, one way to tailor an intervention for this group of individuals would be to use visual stimuli (e.g., videos with typically developing peers modelling appropriate behaviours) as opposed to delivering interventions using the traditional method of talk therapy. Additionally, there is a need to separate the adolescent without ASD from those with ASD. One of the primary reasons for this is that the adolescent with ASD may "mimic more criminally oriented behaviour and be reinforced or feel accepted by the predominance of individuals around them who share their interests" (Sutton et al., 2013, pp. 180). Therefore, living in such treatment environments (typically for an average of 18 months), may potentially have a significant negative impact with decreased opportunities for appropriate social learning and development which should be taken into consideration (Sutton, Hughes, Huang, Lehman, Paserba, Talkington et al., 2013). Others have also highlighted other ways in which the intervention process may fall short of meeting the unique needs of individuals with ASD. Higgs and Carter (2015) have highlighted that programs which are delivered in groups may be particularly challenging of individuals with ASD given the demand of interacting and learning with other offenders as well as the facilitators (Higgs & Carter, 2015).

There has been a number of studies which support this need to tailor treatment programs in order to match the needs of sexual offenders with ASD. In a group of 43 adolescents adjudicated delinquent due to a sexual offense, Bleil Walters and colleagues (2013) investigated self-reported presence and severity of abuse, neglect, and depressive symptoms. They found that 27 of the adolescent sexual offenders also had an ASD diagnosis. Sixteen were not found to have an ASD diagnosis. Moderate to high levels of abuse and neglect were identified in both groups. Significantly higher depressive symptoms were found in the adolescent sex offender with ASD compared to those adolescents with no diagnosis of ASD. In the group of adolescents with an ASD, depressive symptoms were more likely to be found in those who reported severe levels of emotional abuse and/or emotional neglect. The findings of Bleil Walters and colleagues is consistent with the theory outlined by Sobsey and Mansell's (1997) which stated that in relation to emotional abuse and/or emotional neglect children with ASD may, as a result of their impaired social knowledge and problem-solving abilities, be more likely to experiences difficulties in coping with verbal assaults and demeaning statements made by adults (Bleil Walters, Hughes, Sutton, Marshall, Crothers, Lehman et al., 2013).

There is also a need to consider the importance of diversionary measures in some cases. A recent review by Allely (2015) highlighted that inmates with ASDs may be at an increased risk of bullying, confrontations, exploitation, anxiety and social isolation as a result of their ASD traits such as obsessions, social naivety and impaired empathy. The review conducted by Allely (2015) identified a modest amount of studies (n=4) which have explored the experience of individuals with ASD in prison. Only one study was identified which investigated the knowledge and understanding of ASDs amongst prison staff. The review emphasises the need for further research to consider the specific problems faced



by inmates with ASD, to identify how to make the prison environment safer and more supportive for inmates with ASD and how to reduce the likelihood of re-offending. As highlighted by Freckelton (2011), considering whether there are ‘innate vulnerabilities’ (e.g., social impairments which are inherent in ASD) in individuals with ASD which increase the likelihood that they will be charged with sexual offending is crucial (Freckelton, 2011). Kellaheer (2015) argues that “given their innate socialization and sensory challenges, careful assessment of the nature of deviant sexual behaviors is strongly recommended in research, clinical treatment, and criminal justice proceedings involving ASD individuals” (Kellaheer, 2015, pp. 25). Lastly, the review by Mogavero and Mogavero (2016) highlighted the importance of addressing specific needs of individuals with ASD who become involved with the criminal justice system as a result of their sexual offending behaviour.

In summary, Sutton and colleagues (2013) argue for the importance of considering the adverse impact that spending time in treatment centres might have on the individual with ASD in terms of reduced opportunities for appropriate development and social learning. Research is urgently required to identify the specific requirements and needs of sexual offenders with ASD in order to inform an appropriate treatment strategy for successful outcomes (Sutton et al., 2013).

## **Conclusion**

Having an ASD is clearly a significant factor relating to the trial process. Court rooms have been described as “complicated and confusing places” (judiciary.gov.uk), with some traditions of the English courts being over six hundred years old, and wigs and robes being traditional in the higher criminal courts.

Witnesses are often confused, and this is a deliberate tactic in cross examination in order to throw doubt and confusion upon a witness’ evidence. To consider this experience from the eyes of the defendant with an ASD, described as having “difficulty in understanding what is not explicitly stated, (including) non-literal or ambiguous meanings of language” (DSM-V, American Psychiatric Association, 2013), the complication and confusion can only be amplified.

In order to convict a defendant of any offence the Prosecution must prove the defendant’s guilt beyond all reasonable doubt. The Woolmington Principle, from the House of Lords appeal case of *Woolmington v DPP* (1935) clearly describes this:

“Throughout the web of the English criminal law, one golden thread is always to be seen, that is the duty of the prosecution to prove guilt... If there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, then the prosecution has not made out the case and the prisoner is entitled to an acquittal... No matter what the charge, no matter where the trial, the principle that the prosecution must prove the guilt is part of the common law of England and no attempt to whittle it down will be entertained”

If the jury has any doubt that any element of the offence is not made out, then an acquittal must result.

Having a jury is the foundation to the judicial system in England and Wales. Being tried by twelve fellow members of society must be considered the keystone to a fair trial. In the case of *R v B* (2006) it was succinctly put;

“juries up and down the country have a passionate and profound belief in, and a commitment to, the right of the defendant to be given a fair trial. They know that it is integral to their responsibility... They guard it faithfully, and the integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court. We cannot too strongly emphasise that the jury will follow them (directions), not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair...”

However, whilst this protection is fixed in criminal law, it has been seen in this article that when the jury is unaware of the facts surrounding a defendant’s ASD it fails to offer the safeguards that should be afforded.

Sexualised behaviour can be misconceived and misinterpreted in light of the legal requirements for conviction.

We have discussed cases like that of *R v Thompson* who had a history of lengthy periods of imprisonment over a span of thirty years. It was not until his diagnosis of ASD sometime later that this ‘golden thread’ was acknowledged and the judicial directions made. In this case, doubt was placed in the mind of the jury, so much so, that on appeal it was held that despite the prosecution arguing that the defendant presented as “a calculating witness... one who was quite capable of trimming his evidence to suit the case being presented to the jury”, that “the court could not conclude that such criticism established that (he) was lying about the lack of sexual motivation for his actions”. Consequently, the verdicts were considered unsafe and quashed.

The aforementioned deficiency in social awareness and interpersonal skills, potentially coupled with a poor ability to appreciate non-verbal cues from others, *may* therefore increase the risk of an accused that has an ASD to behave in a sexual manner. This in turn could lead a jury to believe beyond reasonable doubt that he has fulfilled all of the requirements of a sexual charge. The jury considering here the honest and reasonable belief of the defendant at the time of the sexual activity; behaviour that

if witnessed in someone neuro-typical may very well, and has as we have seen with reference to recent case law, led to a different outcome.

We conclude that sexual behavior in a defendant with an ASD often does not sit with the criminal definitions within the relevant statute. There will undoubtedly be defendants with an ASD who will understand their sexual behaviour is wrong, recognising fantasy thoughts linked with criminogenic behaviour, who will be rightfully convicted. However, Attwood and Ince (2016) found that “medical diagnosis is now sitting as an uncomfortable bed-fellow with criminal law and sentencing in such cases.”

In this short analysis, we have shown examples of lack of clinical research in this area. Alongside this we discuss legal omissions whereby on appeal sentences have been quashed in light of new information regarding diagnosis of an appellant’s ASD. This may be due to lack of understanding and training for advocates and judiciary. This will be an important area of research to consider further.

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